

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**



ORIGINAL

75-7441

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

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In the Matter of the  
Complaint of

IRISH SHIPPING LTD., Plaintiff-Appellant, as owner of  
the S.S. "IRISH SPRUCE",

For exoneration from or limitation of liability.

COMPANIA PERUANA DE VAPORES, S.A.,  
*Claimant-Appellant,*

SPRAGUE & RHODES COMMODITY CORP., *et al.*,  
*Claimants-Appellees.*

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AMERICAN SMELTING AND REFINING COMPANY,  
*Plaintiff-Appellee,*

*against*

S.S. IRISH SPRUCE, HER ENGINES, TACKLE, ETC.,

*and against*

IRISH SHIPPING LTD.,  
*Defendant-Appellant.*

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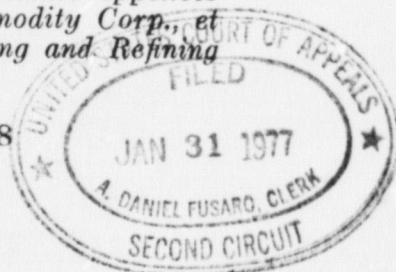
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PETITION FOR REHEARING IN BANC ON BEHALF OF  
CARGO CLAIMANTS-APPELLEES SPRAGUE &  
RHODES COMMODITY CORP., ET AL., AND  
AMERICAN SMELTING AND REFINING COMPANY

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**PETITION FOR REHEARING IN BANC ON BEHALF OF  
CARGO CLAIMANTS-APPELLEES SPRAGUE &  
RHODES COMMODITY CORP., ET AL., AND  
AMERICAN SMELTING AND REFINING COMPANY**

Claimants-Appellees respectfully request rehearing, with a suggestion for rehearing in banc, and reconsideration of this Court's Opinion and Judgment dated January 17, 1977 on the grounds that this Court overlooked the principle of concurring cause or misapprehended the findings of fact of the District Court. Specifically this Court's opinion overlooked the following:

- 1) But for the failure of the Irish Spruce to have the 1971 Edition of the List of Radio Signals on board, it would *not* have stranded and been lost while enroute to New Orleans. The evidence is that Officer Healy used the *aero* radiobeacons listed in the indexes in the 1969 Edition. He did not use the *aero* radiobeacon at Isla San Andres, which is not listed in the indexes in the 1969 Edition. The 1969 Edition contains a *warning* that unlisted *aero* radiobeacons were not considered reliable for marine use. The 1971 Edition did list the *aero* radiobeacon at Isla San Andres in the indexes, and further stated that only selected *aero* radiobeacons likely to be of particular use for *marine* navigation are listed and charted. Under the circumstances, it can only be pure speculation that Officer Healy would not have used the 1971 Edition the same as he used the 1969 Edition. If the vessel had had the 1971 Edition on board, the loss would have been avoided. The conclusion by this Court that Officer Healy negligently failed to find and use the *aero* radiobeacon at Isla San Andres in the 1969 Edition is concurring at most. It does not eliminate the failure of the vessel to have the 1971 Edition on board as a concurring cause.
- 2) The case was tried before a Magistrate (now Judge Goettel) by agreement. The Magistrate found that

the absence of the up-to-date 1971 Edition was an "unseaworthy condition" and that this omission was a proximate cause of the stranding. The District Court "reviewed the entire proceeding", and concluded that the Magistrate's Report was sound and should be sustained. Regarding the question on remand, the District Judge added that the synthesis of the evidentiary materials given by the Magistrate in his resolution of the causation issue was "persuasive—surely not clearly erroneous". The finding of causation is factual and, having already met the "clearly erroneous" test, should not be reversed by this Court.

### POINT I

**But for the failure of the Irish Spruce to have the 1971 Edition of the List of Radio Signals on board, the vessel would *not* have stranded.**

There is no mystery here. The IRISH SPRUCE went aground because it was unseaworthy in that it did not have the 1971 Edition of the List of Radio Signals on board. Both Magistrate (now Judge) Goettel and Judge Frankel held that the absence of the 1971 Edition rendered the vessel unseaworthy. However, this Court incorrectly held that "any unseaworthiness which conceivably might be charged to the absence of the 1971 edition cannot be held to have been a proximate cause of the stranding" (Slip Op., p. 6135). The evidence is clearly to the contrary.

Second Officer Healy's actions, his actual practice, tell it all. Mr. Healy joined the IRISH SPRUCE on June 10, 1971 as Second Officer (525a). He had held a Chief Mate's license since July 1970 (525a). His duties included navigation of the vessel and responsibility for all charts and nautical publications (29a-30a, 493a, 526a). He was the officer on watch at the time of stranding.

Mr. Healy was the first witness called by the carrier at the trial. The Magistrate heard his testimony; observed his demeanor; examined the documents in evidence includ-

ing Mr. Healy's Journal (Red Book) (Ex. 52, 855a-925a); and, concluded that Mr. Healy was "an unusually conscientious navigator" (994a-995a). The carrier itself referred to Mr. Healy's "meticulosity in matters of navigation" (Carrier's Post-trial Brief, p. 12; 1027a).

An examination of Mr. Healy's Journal clearly demonstrates that he was an excellent officer, and particularly so in respect of his careful attention to using available aero radiobeacons in areas which his vessel transited. The Journal contains the following entry for Friday, October 1, 1971:

"D.F.'s of Swan Island (SWA-407) & Grand Cayman, Owen Roberts (ZIY-344) were good and clear at daylight." (902a)

Mr. Healy carefully *recorded* in his Journal the call signs and frequencies for both Swan Island and Grand Cayman (Owen Roberts), and *he used* both *aero radiobeacons*. The information about the aero radiobeacon on Swan Island that Mr. Healy *recorded* in his Journal is contained in the section about Service Details in the old (i.e. 1969) List at page 432 and Swan Island is also *listed* in the Geographical Index of the old List at page 14 (833a, 807a). The information about Grand Cayman (Owen Roberts) that Mr. Healy recorded in his Journal is contained in the section about Service Details in the old List at page 430, and the Cayman Islands are also *listed* in the Geographical Index of the old List at page 10 (831a, 803a).

Swan Island is approximately 240 miles northwest of Quita Sueno Bank, and Grand Cayman is somewhat northeast of Swan Island (Ex. 3). Accordingly, it is clear that Mr. Healy *knew before* January 27, 1972 what information was contained in the old List for the area in question, and it is also clear that *he used* that information. Since Mr. Healy used the information contained in the old List, he would have used the new List *if he had been given the opportunity*. His actual practice speaks louder than words and should be conclusive.

There is further evidence that Mr. Healy paid careful attention to the *proper* use of radiobeacons. In his Journal



(Ex. 52) Mr. Healy made the following entry for July 17, 1971:

"Aero D.F. stations on the Azores were fairly good; Terceira (LJ-396); Flores (FS-270); Graciosa (GRA-283); Horta (HOR-308)" (878a).

Mr. Healy *recorded* in his Journal the call sign and frequency of the indicated aero radiobeacons and he *used* them. The information he *recorded* in his Journal is contained in the section about Service Details in the old List at page 251, and The Azores are also *listed* at page 10 in the Geographical Index of the old List (829a, 803a).

Mr. Healy made the following entry in his Journal on July 26, 1971:

"Aero beacon, Cristobal, France Field FTD-326 was of some assistance in making a landfall." (883a)

Again Mr. Healy *recorded* in his Journal the call sign and frequency of the indicated aero radiobeacon and he *used it*. The information about Cristobal, France Field (Panama), that he *recorded* in his Journal is contained in the section about Service Details in the old List at page 414, and Panama is also *listed* in the Geographical Index of the old List at page 13 (830a, 806a).

Mr. Healy made the following entry in his Journal on February 8, 1971:

"D.F. station at Treasure Cay (ZTC-233) was fairly good." (860a)

Again Mr. Healy *recorded* in his Journal the call sign and frequency of the indicated radiobeacon and he *used it*. The information about Treasure Cay (Bahamas) that he *recorded* in his Journal is contained in the section about Service Details in the old List at page 431, and The Bahamas are also *listed* in the Geographical Index of the old List at page 10 (832a, 803a).

It is no wonder that included in the findings made by Magistrate Goettel in the Special Master's Report dated October 15, 1974 is the following:

"While Mr. Healy is relatively young, he appeared to be an unusually conscientious navigator. Had he had

the revised list on board, I find that he would have examined it, determined the availability of the radio beacon, and used it." (994a-995a)

Mr. Healy used *listed* aero radiobeacons contained in the 1969 List. The 1969 List contained a specific *warning* that *unlisted* aero radiobeacons were not considered reliable for marine use, and further "warned that the charted position of an Aero Radiobeacon not listed in this volume may be in error" (993a, 815a). Mr. Healy did not use unlisted aero radiobeacons. This was in accordance with the warning contained in the 1969 List. The superseded 1969 List did not list the aero radiobeacon at San Andres in the alphabetical list of call signals beginning at page 17 (810a), nor in the geographical index beginning on page 10 (803a), nor in the alphabetical list of Morse identification signals beginning on page 77 (819a), nor in the list of radiobeacons beginning on page 86 (828a, 993a).

As contrasted with the outdated List that was on board the vessel, the 1971 Edition (Ex. E) lists the *aero* radiobeacon at Isla San Andres on page 183 (951a) with all essential details, including its *power* (one kilowatt), the fact that it is in *continuous* transmission, its call sign, the radio frequency, the exact position of the beacon, and the type of radio emission (A 1) that is used (993a). The 1971 Edition also lists the aero radiobeacon at San Andres in the alphabetical list of identification signals on page 33 (949a) and in the alphabetical index of stations on page 222 (953a).

To say that Mr. Healy, who used the 1969 List in accordance with the warning contained therein, would not have used the 1971 List and discovered the San Andres listing is *pure speculation*. This Court's description of his use of the 1971 List as a "fortuity" (Slip Op., p. 6135) is untenable in view of Mr. Healy's actions and the findings of the trier of fact.

This Court held that "the general organization of this edition (i.e. 1971) was significantly varied from that of the 1969 edition" (Slip Op., p. 6130). Where the old List *discouraged* a navigator from using *unlisted* aero radio-

beacons, the 1971 List *encouraged* the navigator to use *listed* ones. That the 1971 edition contains new, important data not available before, is stressed in the preface at page 5 where it states that the principal changes include:

"(3) All RADIOBEACONS, *including AERO RADIO-BEACONS*, are *listed* in *geographical* sequence; all appear in the *Alphabetical* List of Identification Signals and all are numbered." (942a) (emphasis added)

The 1971 edition further states on page 13 that

"Only selected Aero Radiobeacons likely to be of particular use for marine navigation are listed and charted." (945a)

Swan Island is an aero radiobeacon and Healy used it because it was *listed* in the 1969 List. How can it be speculated that he would not have used the 1971 List as he had used the 1969 List? He used the *listed* aero radiobeacons in the 1969 List. He was described by both the Magistrate and the vessel owner as meticulous in matters of navigation (1027a). There is no reason to doubt that he would have used the *listed* aero radiobeacons in the 1971 List had it been aboard the vessel and found San Andres aero radiobeacon. *The failure to have the 1971 List on board, which listed San Andres, was a concurring cause of the loss.*

What more do claimants have to do to establish unseaworthiness as being a concurring cause?

The conclusion by this Court that Mr. Healy negligently failed to find and use the aero radiobeacon at San Andres in the 1969 List is concurring *at most*. It does not eliminate the failure of the vessel to have the 1971 List on board as a concurring cause. The 1971 List *listed* San Andres and Mr. Healy used *listed* aero radiobeacons. But the 1971 List was not on board so Mr. Healy didn't have the opportunity to use it.

The Magistrate correctly found that the absence of the up-to-date Radio List was an unseaworthy condition which "was an effective cause of the loss. It was a 'proximate



cause' . . ." (1002a-1003a). The District Judge affirmed the Magistrate and said:

"The Magistrate followed a correct conception of the applicable law in his analysis of the causation issue. The law under the Carriage of Goods by Sea Act is clear that if both an 'excepted peril' under § 4(2), 46 U.S.C. § 1304(2) (1970), and unseaworthiness or another element described in § 3(1), 46 U.S.C. § 1303(1) (1970), concur in causing cargo damage, the shipowner is liable for the entire loss unless he can exonerate himself from part of the liability by showing that some portion is attributable solely to the 'excepted peril'. See *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 588 (2d Cir. 1971), *Union Carbide & Carbon Corp. v. The Walter Raleigh*, 109 F.Supp. 781, 791 (S.D.N.Y. 1951), aff'd, 200 F.2d 908 (2d Cir. 1953). This familiar doctrine, given the basic events as the Magistrate reconstructed them, leads to the result he reached. *There were concurring causes in the pertinent sense.*" (Op. 1019a-1020a) (emphasis added)

The findings of the District Court are in accord with the established case law. In addition to the cases cited by the District Court, see *Ionian Steamship Co. v. United Distillers of America*, 236 F.2d 78, 80 (5th Cir. 1956); *The Temple Bar*, 45 F.Supp. 608 (D.C. Md. 1942), aff'd 137 F.2d 293 (4th Cir. 1943); *Spencer Kellogg & Sons, Inc. v. Great Lakes Transit Corp.*, 32 F.Supp. 520, 532 (E.D. Mich. 1940); and *Waterman Steamship Corporation v. Gay Cottons (The Chicasaw)*, 414 F.2d 724 (9th Cir. 1969). In the *Waterman* case a vessel was held to be unseaworthy in failing to have an up-to-date deviation card for its radio direction finder. The Court said:

"But the failure to have an 'efficient' radio direction finder is sufficient to deny limitation of liability if it merely combined with the crew's negligence in using it to be one of the causes of the stranding.

\* \* \*

How can it be said, except as a matter of pure speculation, that if the finder had worked properly the grounding would still have occurred?

'The navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transfer unseaworthiness into bad seamanship.' *The Maria*, 4 Cir. 1937, 91 F.2d 819, 824." (p. 737) (emphasis added)

The District Judge stated with respect to the IRISH SPRUCE:

"Absence of the revised list deprived the ship of the information which was available and which it needed to be reasonably equipped to carry out its services." (Op. 1019a)

The Magistrate properly found that "the beacon on San Andres would have provided an excellent 'danger bearing' " (997a); and, that "a danger bearing of 205°T. or greater could have been used, and if maintained would have kept the vessel out of danger" (997a).

The IRISH SPRUCE was not equipped with LORAN (electronic position finding device) and had to rely on star sights which cannot be taken in overcast weather. The only other useful electronic navigational aid was the radio direction finder. It is "pure speculation" to say that if the vessel had been properly equipped with the 1971 I "the grounding would still have occurred". *Waterman steamship Corporation v. Gay Cottons, supra*.

## POINT II

**Both the Magistrate (now Judge Goettel) and Judge Frankel found that the absence of the 1971 Radio List was an unseaworthy condition and a proximate cause of the stranding. Judge Frankel concluded that the Magistrate's resolution of the causation issue was "persuasive—surely not clearly erroneous."**

The Magistrate held that the unseaworthy condition of the IRISH SPRUCE in not having on board the 1971 Radio List was a proximate cause of the stranding. The District Court concluded that this finding was "persuasive—surely

not clearly erroneous" (1038a). The issue of proximate cause is governed by the "clearly erroneous" test of F.R.C.P. § 52(a). See *McAllister v. U.S.*, 348 U.S. 19, 22-23 (1954). This is the rule of this Court as indicated in *U.S. v. Ebinger*, 386 F.2d, 557 (2d Cir. 1967) where this Court said:

"The combination of the common-sense inference that it was Ebinger's welding that caused the fire, cf. *Achilles v. New England Tree Expert Co.*, 369 F.2d 72, 73 (2 Cir. 1966), the expert testimony, and his inculpatory statement sufficiently support the finding of causation; *in any event it is not 'clearly erroneous,'* F.R. Civ.P. 52(a)." (p. 560) (emphasis added)

See also *Lanasse v. Travelers Insurance Company*, 450 F.2d 580 (5th Cir. 1971), cert. denied 406 U.S. 921 (1972), where the Court said:

"[2] The District Court also found that (i) the sole *proximate cause* of the injury was the negligence of Chevron's crane operator, (ii) the vessel was not unseaworthy and (iii) no member of the vessel's crew was guilty of negligence. While Chevron half-heartedly challenges these findings, we think they are amply supported by evidence in the record that rises way above the Plimsoll line of F.R.Civ.P. 52(b). *They are not clearly erroneous*, and we accept them." (pp. 582-583) (emphasis added)

See: *Rapisardi v. United Fruit Company*, 441 F.2d 1308, 1310-1311 (2d Cir. 1971); *Minerals & Chemicals Philipp Corp. v. S.S. National Trader*, 445 F.2d 831, 832 (2d Cir. 1971).

In view of the specific finding of proximate cause by the Magistrate; the District Court's endorsement of this finding as "persuasive—surely not clearly erroneous"; and, the fact that a finding of proximate cause is governed by the clearly erroneous test—how can this Court "conclude that no showing of proximate cause has been made as a matter of law"? (Slip Op., 6133).



As indicated by Point I above there is ample evidence to support a finding of proximate cause. It is respectfully submitted that when this Court re-examines the record, it will reverse its decision and hold that the finding of proximate cause was *not* clearly erroneous.

### Conclusion

Foreign vessels trading to U.S. ports will not be properly manned and equipped unless the Courts so require. Foreign vessels are not subject to the same inspection standards that the U.S. Coast Guard imposes on U.S. vessels. The recent ARGO MERCHANT stranding off Nantucket and subsequent maritime casualties point out the magnitude of the problem and demonstrate that this "proceeding involves a question of exceptional importance" (Rule 35(a) Federal Rules of Appellate Procedure).

It is respectfully submitted that this petition for rehearing in banc should be granted and that, on rehearing, this Court should change its decision, affirm the decisions of the Magistrate and the District Court and hold the vessel owner herein liable for the unseaworthiness which contributed to this loss.

Respectfully submitted,

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 al., and American Smelting and Refining  
 Company*

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Due and timely service of Two copies  
of the within PETITION is hereby  
admitted this 31<sup>st</sup> day of JANUARY 1977

.....  
Attorneys for APPEAL

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ATTORNEYS FOR APPELLANT

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